In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 352.

THE TIMKEN ROLLER BEARING COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

**REPLY BRIEF FOR THE APPELLANT,
THE TIMKEN ROLLER BEARING COMPANY.**

LUTHER DAY,
Union Commerce Bldg.,
Cleveland 14, Ohio,
JOHN G. KETTERER,
First National Bank Bldg.,
Canton 2, Ohio,
Counsel for Appellant.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

INDEX.

TABLE OF AUTHORITIES.

Cases.

Texts.

Senate Report.

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 352.

THE TIMKEN ROLLER BEARING COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

REPLY BRIEF FOR THE APPELLANT, THE TIMKEN ROLLER BEARING COMPANY.

STATEMENT.

It is apparent from the appellee's brief that the appellee has undertaken simply to support all of the purported findings made by the district court, and, upon the basis thereof to support its conclusions.

Necessarily, therefore, the discussion of the facts in the appellee's brief, while it may appear to be a full discussion of the facts involved in the case, actually omits certain of the most important facts. Moreover, many of the statements in the appellee's brief are made in such a way as to de-emphasize the importance of other facts, resulting in an over-all impression which does not reflect the true state of the facts as disclosed by the record.

For example, it is said (Appellee's Brief, p. 16) that, although tapered roller bearings compete "*to some extent*[1]

---

[1] Emphasis throughout is supplied.

with other types of anti-friction bearings and to a lesser extent with friction bearings" they are "free from competition for certain uses." This statement passes over entirely the uncontroverted evidence that tapered roller bearings compete with other types of anti-friction bearings *for 90%* of the installations of anti-friction bearings, *not merely "to some extent,"* and gives an entirely erroneous picture of the competitive situation in the anti-friction bearing industry.

Again, in stating the facts as to French Timken the appellee says that it is the "largest manufacturer and seller of tapered roller bearings in France" (Appellee's Brief, p. 18), but disregards the evidence which shows what a relatively insignificant operation French Timken is, namely, that it has only 510 employees.

Once more, in discussing Dewar's negotiations with Ely in 1927 the appellee states (Appellee's Brief, p. 30) that the former indicated his preference that the latter should join him in the purchase of British Timken "on account of its 'interest in the profitable operation of the company'" carefully omitting the statement in the same communication that Dewar desired to have American Timken "very much as partners" so that it would have this interest in the profitable operation of British Timken. Indeed, the appellee has not discussed the contemporaneous references to American Timken and Dewar as "partners" in 1927, 1929, and 1936 at all, but has been content to rely upon the finding of the district court and the two statements relied upon in the district court's opinion, discussed in our main brief (p. 82, note 26), which are supposed to show that any possible partnership ended in 1934.

These few examples serve to show that the appellee's statement of the facts cannot be regarded as a full statement thereof. In fact, it portrays the same misleading picture as does the memorandum opinion of the district court, namely, a combination between independent companies,

dominant manufacturers in a mythical tapered roller bearing industry which they control.

The Court will observe that many statements contained in the appellee's brief are merely supported by references to paragraphs in the district court's memorandum opinion.

Many of the factual and legal contentions of the appellee have been anticipated and answered in our main brief. Without attempting to answer piecemeal every minor contention made by the appellee, we propose to discuss certain of the broad issues involved in the case.

ARGUMENT.

I.

THE APPELLEE'S CONTENTIONS AS TO THE ALLEGED COMBINATION AND CONSPIRACY.

A. The 1909 license agreements between American Timken and the Vickers' subsidiary, E. & O. A.

The provisions of the 1909 license agreements between American Timken and the Vickers subsidiary, E. & O. A., loom large in the case at bar, principally because the district court placed such emphasis upon them in arriving at its apparent conclusion that there was an *intentional* illegal combination in restraint of trade which was the "outgrowth of the principal agreements in 1909 when world markets were divided and competition was eliminated" (Mem. par. 120, R. 995). As pointed out in our main brief (pp. 148 to 153), the court disregarded American Timken's contentions as to the legality of its acts on the theory that whatever was done by American Timken and Dewar from 1927 and thereafter constituted merely a continuation of this combination in restraint of trade, which had its roots in the 1909 license agreements. The appellee's brief embraces, and continually expands upon, this theme.

In fact, it is at least doubtful whether the provisions of the 1909 license agreements, found by the district court to have been illegal, constituted violations of the anti-trust

laws. Certainly their legality was sufficiently ambiguous to negative any reasonable inference that American Timken, and the Vickers subsidiary *intended* to violate the Sherman Act at the time these agreements were made, or subsequent thereto.

1. The 1909 agreement covering the United Kingdom.

As the district court found (Mem. pars. 24, 25; R. 962, 963), the license from American Timken to E. & O. A. under the three basic bearing patents in the United Kingdom contained territorial restrictions but they were not entirely exclusive, for both the licensor and the licensee were given the right to sell bearings to manufacturers of vehicles in the territories in which they respectively were making bearings, which, when included in vehicles so manufactured, could be sold any place in the world. We know of no authority which has yet established that a patent licensor may not impose such a restriction upon itself. And it has always been understood that the licensor may limit the patent licensee to manufacture, use or sale within a restricted territory.

E. & O. A. was prevented from manufacturing or selling any anti-friction bearings except those made under the licensed patents under the name "Timken" and was required to manufacture pursuant to instructions given to it by American Timken as the licensor (Mem. par. 25; R. 963). The requirement that E. & O. A. use the name "Timken" in the manufacture and sale of the bearings certainly implied a license to use it, because American Timken necessarily permitted E. & O. A. to use the name when it required it to do so. Restriction to the manufacture and sale of the bearings under the exclusive name "Timken" was a valid one ancillary to the license to use the name which has always been recognized as legal. The authorities supporting this proposition are discussed in Section II, C, *infra*.

There was a provision fixing the minimum price for bearings manufactured by E. & O. A. which was obviously designed to protect the licensor, American Timken, from competition from its licensee, a valid price-fixing provision ancillary to the grant of the license which has been recognized as legal in *United States v. General Electric Company*, 272 U. S. 476; *United States v. Line Material Company*, 333 U. S. 287; and *United States v. United States Gypsum Company*, 333 U. S. 364.

2. The 1909 agreement covering Europe.

The point upon which the district court really relied was based upon provisions in the 1909 license agreement covering Europe which, it held, granted E. & O. A. an exclusive license in European countries in which American Timken had not as yet obtained patents (Mem. pars. 26, 27; R. 963, 964). However, this conclusion is certainly debatable in view of the language of the agreement and particularly one qualifying provision therein which the district court did not include in its memorandum, and which has not been commented upon in the appellee's brief. In this agreement (Deft's. Exh. 190; R. 2322; offered, R. 936), American Timken agreed to pursue its application for the German patent (par. 2) and granted the licensee an exclusive license "in the territories *covered* by the said patents respectively" under two French patents, a Russian patent, and under the German patent, applied for, *as soon as letters patent should have been obtained there,* and further granted E. & O. A. an exclusive license, until the patents should have been granted or after they had ceased to exist, "but only so far as the licensor can then lawfully do so" to make, use, exercise and vend the articles embodying the subject matter of the patents (par. 3). It also agreed that if it should obtain any patents in any of the other European countries it would give the licensee an exclusive license "in the country *covered by* each such patent" and

that, until they should be obtained, "so far as the licensor can lawfully do so in the absence of such patents or grants"[2] E. & O. A. should be licensed exclusively to manufacture and sell the subject matter of the three British patents throughout Europe and in the British colonies, protectorates and dependencies except Canada (par. 5). American Timken agreed that during the period of the license agreement it would not make, use nor sell "in any of the territory *covered by* the provisions of this agreement, hereinafter called 'said territory'" (par. 6), and E. & O. A. agreed not to sell roller bearings "outside the said territory" (par. 39).

Obviously, when the parties referred to territory "covered" by the agreement, as they did in various sections thereof, they may well have been referring to territory "covered" by the agreement when, if and as patents should be obtained "in the country covered by each such patent," so that the provisions as to exclusive territories would not become operative as to particular territories until they should become covered by patents. Moreover, American Timken granted an exclusive license only to the extent that it could lawfully do so. Therefore, it canot be said unequivocally that the agreement was so clearly an attempt to create an exclusive license of the right to manufacture tapered roller bearings in countries in which American Timken had no patents that it constituted an obvious attempt to create an illegal restraint of trade.

On the contrary, the general impression to be deduced from the agreement is that powerful Vickers insisted on obtaining everything it could in the way of an exclusive license from American Timken, which was in its infancy, and that the latter agreed to the former's demands with the reservation, however, that it would license Vickers' subsidiary only to the extent that it could lawfully do so.

---

[2] This is the provision ignored by the district court.

B. The appellee's contention that the district court's findings establish that the agreements and other concerted activities of the three Timken companies have unlawfully restrained foreign commerce.

Generally speaking, this section of the appellee's brief undertakes to demonstrate that combinations among independent competitors to allocate exclusive territories, fix prices, eliminate competition of outsiders, and to exchange technological information exclusively for the purpose of eliminating competition of third parties, constitute violation of the anti-trust law. No one can quarrel with the truth of these general propositions. Whether or not they are applicable to the case at bar, in view of the facts, is the issue in the case.

Certain of the statements contained in this section of the appellee's brief, however, should be made the subject of comment.

1. Alleged Price Fixing.

One aspect of American Timken's practices in relation to British Timken and French Timken which the appellee attacks most vigorously is what it terms "price fixing." The appellee apparently regards the alleged price fixing agreements as independent violations of the Act, quite apart from the territorial allocations. The matters to which reference is made are (1) the prices on replacement bearings, (2) the alleged protective discount, and (3) the Russian sales provision.

In approaching the discussion of alleged "price fixing" in this case, one thing should be made clear. There never was any provision in the agreements which undertook to fix generally the prices of either American Timken, British Timken or French Timken.

It should be observed, however, that the pricing provisions, such as they were, in the 1938 agreement between

American Timken, British Timken and French Timken were merely incidental to the territorial allocations, and were adopted as reasonable conditions governing that portion of the territorial allocations which permitted each of the parties to sell bearings for use in the territory of the other for replacement purposes in equipment which originally was supplied with bearings by such party. If, as we have shown, the territorial allocations were lawful, they were not rendered illegal by relaxing their strictness, and the pricing practices which were agreed upon to govern this situation do not fall under the Sherman Act's condemnation of price-fixing, as interpreted by this Court.

In the 1928 agreements there was no provision whatever with respect to prices. The position that the agreement had as one of its purposes the fixing of prices is clearly unsound. Recognizing the shallowness of its contention that price-fixing was one of the objects of the first agreement in which American Timken and Dewar participated, the appellee says on pages 35 and 36 of its brief:

> "Although the 1928 contract (Def. Ex. 23, R. 1754) did not specifically provide for price fixing on replacement bearings, such price fixing was accomplished by a supplementary understanding."

This had reference to what has been called by the district court and the appellee the "protective discount." Actually the "protective discount" had no such sinister scope as was implied in the foregoing language. Prior to 1927 a "protective discount" was established by American Timken for unsolicited bearing orders that originated outside the United States in areas not served by any distributor, and a similar system had been adopted by British Timken for overseas sales. First, it should be noted that this business of American Timken amounted to only \$15,000.00 or \$25,000.00 per year, so that any practices affecting it hardly warrant serious consideration. The whole

story on these discounts ~~were~~ is simply that in 1927 Hess told Dewar that British Timken was losing business by having a low discount rate on these sales; that he thought British Timken would get more business if it increased its discount rate to 50%; and that British Timken thereupon increased its discount (that is, reduced its prices) to the rate then allowed by American Timken, namely 50% off list (although the list prices were not the same nor were they affected by the discussion) (Deft's. Exh. 31, R. 1800-1834 at 1830, offered R. 318). American Timken's discount rates were subsequently changed by it, without any consultation with British Timken, for unsolicited orders received from all territories except British Timken territory (R. 893-894, 906). The effect of the discount system, then, was no more than a further refinement of the territorial provisions, just as in the case of the provision regarding replacement bearing sales, and was therefore reasonably ancillary to the joint venture.

The pertinent provision of the 1938 business agreement between American Timken, British Timken and French Timken (Deft's. Exh. 27, R. 1771-1780, offered R. 291) was contained in paragraph 6(B) as follows:

> "The covenantor Company in its territory may accept and execute orders for bearings for ultimate destination in the territory of the covenantee Company for use for bearing replacement purposes in such completed articles of manufacture but such right shall not authorize sales to or known to be destined for manufacturers in the territory of the covenantee Company or sales at prices in conflict with the wishes of the covenantee Company and the covenantor Company from time to time will notify the covenantee Company of the details of the sales authorized under this paragraph and will pay to the covenantee Company an amount equal to five per centum of the net sale price received under any sales so authorized not being sales made through or at the request of the covenantee Company."

This is substantially identical with the provision in the 1935 Agreement between American Timken and British Timken, where it first appeared, quoted in the district court's memorandum opinion at paragraph 59 (R. 970). In the agreement, it follows the provision authorizing bearings to be shipped into either party's territory as component parts of completed articles of manufacture. This obviously is not a price-fixing agreement as such. But more than that, there was no evidence that the parties had followed this provision of the agreement. Moore's uncontradicted testimony (R. 896-897) is that when bearings are sold to an American manufacturer, it is assumed that a certain percentage will be used for replacement purposes, domestically and for export; that American Timken has no control over the places to which the bearings are shipped; that it makes no efforts to control the prices of such resales; and that this is generally understood by British Timken and French Timken.

As to alleged control of prices on resale by customers, the evidence discloses only one instance in which, over twenty years ago, in 1928, American Timken undertook to persuade a customer to ask its Hungarian distributor to sell at prices which would not undercut those of British Timken's Hungarian distributor (Pltf's. Exh. 39, R. 1387). It refused to do so as a general practice (Pltf's. Exh. 43, R. 1390, 1391).

Fair consideration of the Russian situation fails to support the appellee's views. In the 1928 agreement Russia was treated as British Timken's territory for the obvious reason that the British Government had trade relations with Russia before the American Government did. By 1935 the American Government had established relations with Russia and American Timken and Dewar felt that both companies might be able to do some business there.

The Supplemental Business Agreement of 20 November, 1938 (Deft's. Exh. 28, R. 1780-1789, offered R. 291)

contained in paragraph 12(C), relating to Russia, similar to the clause in the 1935 agreement, a provision authorizing both British Timken and American Timken to sell in Russia, but specifying that they should keep each other advised of negotiations with Russian buyers, and should pay the other a two per cent commission and share all selling expenses on such sales, that prices should "so far as practicable be mutually agreed from time to time," but that either company might make quotations without the other's consent, provided it notified the other party and did not undercut a quotation already made by the other.

This arrangement was designed for the special situation in the Russian economy. As Moore testified (R. 899), since the Russian Government controlled all buying for industry in that country, it was feared that it might seek to take advantage of that position by attempting to obtain quotations from both American Timken and British Timken, and then play one against the other to their mutual disadvantage. In fact, however, Moore could not recall any instance, since 1928, when the Russian buying agencies asked for bids from both American Timken and British Timken on the same order. (R. 898-899.) The fact that they notified each other of the prices at which sales had been made to Russia (R. 897), then, can hardly be declared to be "price fixing."

Furthermore, there was no evidence that this part of the agreement had any effect on prices of bearings sold to Russia. It could not have done so, because the defendant always had strong competition from other American producers. (R. 898.) Again, whatever interpretation be given the provisions of the agreement, they had no practical importance because the situations for which they were designed never arose.

Of course, as has been stated, these provisions did not purport to, and could not, have any effect of fixing the prices at which sales were to be made by American Timken, British Timken or French Timken generally.

The authorities relied upon by the appellee on the subject of price-fixing have nothing to do with a situation of the type involved here. The *Socony-Vacuum* case, 310 U. S. 150, and the *Trenton Potteries* case, 273 U. S. 392, dealt with combinations one of the basic purposes of which was the control of prices. None of this doctrine applies to this case. It is indeed a strange "price-fixing" agreement (if the 1928 agreement is to be called such) which never mentions prices, much less price-fixing.

Another basic weakness of the charge and the finding with respect to price-fixing is that they ignore the fact that American Timken, British Timken and French Timken did not possess the power effectively to *control* prices, particularly not in the markets where the provisions with respect to prices were applicable. It is urged by the appellee that any agreement with respect to prices, regardless of the ability of the parties to affect the market price of the commodity in question, is per se a violation of the Sherman Act. We submit that this is too broad a statement of the law relating to price-fixing agreements, and that it must be qualified by the proposition that the illegality of price-fixing practices depends on the power of the parties engaged therein to make their purposes effective to that end. *United States vs. Socony-Vacuum Oil Company*, 310 U. S. 150; *United States vs. Masonite Corporation*, 316 U. S. 265; *Board of Trade of the City of Chicago vs. United States*, 264 U. S. 231; *Standard Oil Company (Indiana) vs. United States*, 283 U. S. 163; *Appalachian Coals, Inc. vs. United States*, 288 U. S. 344; and *Ethyl Gasoline Corporation vs. United States*, 309 U. S. 430.

There is no evidence in this case that American Timken, British Timken and French Timken, had such a controlling position in the anti-friction bearing industry of the world that they could thus control prices. Indeed, there was no evidence that the provisions of the agreements with respect to prices or any practices of the parties

affected prices in any way, or that this was even their purpose.

For the above reasons, we submit that the price-fixing claims made cannot be sustained, and that there has been no price-fixing between American Timken, British Timken and French Timken in violation of the Sherman Act.

2. Alleged elimination of outside competition.

The statement that "in some instances they have acted collectively to drive outsiders out of the market" (Appellee's Brief, p. 70) is entirely unsupported by any evidence that any competitor of any of the Timken companies had been driven from the market. The same is true of the statement (Appellee's Brief, p. 71) that the practice of "sales to each other on a 'most favorable basis' has made it thoroughly impossible for independent producers to compete." It is completely unsupported by any evidence that independent producers have become unable to compete as a result of any such practice. On the contrary, the evidence discloses that such companies as SKF were consistently making competition very difficult for the Timken companies by underselling them in the various markets. See, for example, the situation in Canada referred to in the appellee's brief (p. 45, note 58), where American Timken solicited assistance from British Timken in order to meet, not eliminate, SKF competition.

In reality, all the acts complained of as having been done by American Timken, British Timken and French Timken were of a character which would normally be associated with the efforts of any three related companies to obtain business to the necessarily resultant exclusion of their competitors.

It is stated categorically that American Timken has exercised the policy of refusing its special bearing steel to competitors who might harm British Timken, the district court finding that the parties made certain that their

special steel "was not made available for use to their competitors" (Appellee's Brief, p. 71). In fact, the district court's finding to this effect (Mem. par. 104; R. 990) was obviously based solely upon the exchange of letters set forth in its memorandum (par. 105; R. 990), in which Hess merely told Dewar that American Timken would not sell its steel tubing to anyone in the world who might as a result harm any of the three Timken companies. There is no evidence in the record that any such policy was actually followed. On the contrary, it is apparent from the provisions of the 1935 business agreement between American Timken and British Timken (Pltf's. Exh. 20, R. 1346; § 9, R. 1351) that provision was made by which American Timken could grant licenses to manufacture, make and sell its steel and tubes in British Timken's territory, and the evidence is uncontroverted that American Timken sells such tubing to its competitors in this country (R. 72-74).

3. Alleged exclusive exchange of know-how.

While there is some claim that there was exclusive exchange of know-how for the purpose of eliminating the competition of third parties (Appellee's Brief, p. 73), the appellee does not attempt to point to any evidence supporting the statement of the district court (Mem. par. 124, R. 996) cited in its brief on that point. Here, again, there is no evidence that any competition has actually been eliminated by virtue of this alleged practice. The district court's statement in this respect is entirely inconsistent with its further statement that "the know-how furnished by defendant to the other companies was not a secret process for the manufacture of tapered roller bearings," and that other manufacturers "were admitted to the plants of British and French Timken, where they could observe *all the know-how* put into operation" (Mem. par. 168, R. 1007).

How the district court could have found, or the appellee could seriously assert, that exclusive exchange of know-how

has buttressed the alleged combination, in view of this last statement of the court, is impossible to understand.

4. Alleged restrictive use of the trademark "Timken."

We call attention at this point that the provisions of the agreements relating to the use of the trademark are of the type and kind that would be found in the usual trademark license agreement. A full discussion of the various provisions complained of by the appellee appears in Section III, C, *infra.*

5. Alleged participation in agreements between British Timken and French Timken and their competitors.

The appellee states that these agreements, although made abroad, were restrictive upon exports by United States bearing producers and had a direct effect upon the foreign trade of the United States, citing paragraphs 117 and 136 contained in the district court's memorandum (Appellee's Brief, p. 81). No citations to the record in support of these findings are made and, as is pointed out in our main brief (p. 160), the uncontroverted evidence in the record is that none of these agreements could have had the effect of restricting exports from, or imports into, the United States of tapered roller bearings (R. 207, 208).

Obviously, the agreement between British Timken and the SKF subsidiary in England could not have affected United States exports or imports because it related merely to prices and customers and did not fix quotas which might have tended to reduce exports from American Timken to British Timken (R. 141).

While the appellee states that the export trade of American Timken was directly affected because the quantity of the bearings which it could ship into France was limited by the quota provisions in French Timken's agreement with SKF, the uncontroverted evidence is that these quotas were consistently exceeded by French Timken, as detailed in our main brief (p. 160).

These agreements related exclusively to domestic bearing business in England and France. There was no evidence that they were intended to affect the foreign commerce of the United States, and none which affirmatively showed that they had such an effect. Therefore, they were not illegal under the Act, because, to establish illegality, it must be shown that they were intended to have, and actually had, an effect on American foreign commerce. In *United States v. Aluminum Co. of America*, 148 Fed. (2d) 416, the court, discussing such agreements, said (p. 443):

> "Did either the agreement of 1931 or that of 1936 violate § 1 of the Act? The answer does not depend upon whether we shall recognize as a source of liability a liability imposed by another state. On the contrary we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. * * * Two situations are possible. *There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports.* Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, *it is safe to assume that Congress certainly did not intend the Act to cover them.* * * *"

In that case, the agreements were intended to affect imports into the United States and the question was whether, in fact, they did so. In the case at bar, on the other hand, the agreements were not intended to affect either imports into, or exports from, the United States.

In view of the fact that French Timken, at least, was forced into its agreement with SKF in order to survive (see our main brief, p. 161), the arguments of the appellee and the findings of the District Court that these agreements made by Dewar with the competitors in his area were part of the means used by the alleged combination for the purpose of controlling the industry and eliminating the competition of others are not convincing. Since the agreements came to an end in 1939 and have not been renewed (R. 208), they are of no significance in the case.

II.

THE APPELLEE'S ARGUMENT THAT THE ALLEGED RESTRAINTS CANNOT BE JUSTIFIED AS ANCILLARY TO SOME LAWFUL "MAIN PURPOSE."

A. The appellee's argument that the restraints here imposed were unreasonable per se and therefore cannot be justified as "ancillary."

The appellee argues in substance that in order for a restraint ancillary to a valid main purpose to be legal, it must be reasonable in scope, and that a restraint which is unreasonable per se, such as price fixing or allocation of territories, can never be reasonable, so that the provisions for division of territories and alleged price fixing in the business agreements between the Timken companies could not be reasonably ancillary to the formation and conduct of a joint venture between American Timken and Dewar (Appellee's Brief, pp. 83-86).

This argument is not supported by the authorities. It depends for its support upon combination of the *general* principle as to the doctrine of ancillary restraints stated in *United States v. Addyston Pipe Company*, 85 Fed. 271, with *general* authorities such as *Apex Hosiery Company v. Leader*, 310 U. S. 460, and *United States v. Socony-Vacuum Oil Company*, 310 U. S. 150, which did not involve ancillary restraints.

It is well settled, that a restraint ancillary to a valid main transaction may involve price fixing or allocation of territory, or, in fact, an agreement which absolutely prevents competition, provided that it is reasonably necessary to bringing about the consummation of a legal main transaction.

Restraints resulting from price fixing ancillary to the grant of a patent license by a manufacturer to a potential manufacturing competitor have been held legal in *Bement v. National Harrow Company*, 186 U. S. 70, and *United States v. General Electric Company*, 272 U. S. 476. In the recent cases of *United States v. Line Material Company*, 333 U. S. 287, this Court refused specifically to overrule the doctrine of the *General Electric* case as applied to its facts. Contrary to the assertion of the appellee (Appellee's Brief, p. 84, note 79), statutory patent rights do not constitute the sole justification for price fixing. That price fixing can be justified only on the basis that it is reasonably ancillary to the grant of a patent license, in order to encourage it, by protecting a manufacturing patentee from competition of his own making resulting from granting the license, is clear from the distinction made by this Court in *United States v. Masonite Corporation*, 316 U. S. 265, 277, between valid price fixing in such a situation, and invalid price fixing by a patentee who grants a license merely to vend the patented article. In the latter situation, of course, there is no reason, like that of protection of the manufacturing patentee, which justifies fixing the licensee's price, and, therefore, an attempt to fix the price at which the licensed vendor is to sell is outside the scope of the patent monopoly.

Ancillary restraints resulting from allocation of territory have been held not to be illegal per se, *Fowle v. Park*, 131 U. S. 88; *Thoms v. Sutherland*, 52 F. (2d) 592 (C. C. A. 3, 1931). Thus an agreement by a licensor not to license others in the same territory as his licensee con-

stitutes a valid ancillary division of territory for the protection of the licensee, as this Court stated in *Bement v. National Harrow Company,* 186 U. S. 70, 94. Similarly, a valid ancillary restraint is imposed by an agreement by a manufacturer not to sell within a designated territory in competition with an exclusive distributor or selling agent, who is induced to invest his money in the agency by reason of that agreement. *Cole Motor Car Company v. Hurst,* 228 Fed. 280 (C. C. A. 5, 1915), certiorari denied 247 U. S. 511.

The argument of the appellee runs directly contrary to the decision of this Court in *United States v. Bausch & Lomb Optical Company,* 321 U. S. 707, discussed in our main brief (pp. 72, *et seq.*), because in that case ~~this Court~~ held, by a split decision, that an agreement which prevented any competition whatsoever between Bausch & Lomb and Soft-Lite in the distribution of pink tinted lenses was not illegal under the antitrust laws. The same is true of those traditional restraints imposed by the agreement of the vendor of a business to refrain from engaging therein in the same territory for a period of years, which has always been recognized as legal. An agreement for *no* competition certainly imposes a restraint just as effective as, if not more than, an agreement not to compete on the basis of price or in the same territory.

Again, in such cases as *International Salt Company v. United States,* 332 U. S. 392, and *Fashion Originators' Guild v. Federal Trade Commission,* 312 U. S. 457, this Court has indicated that combinations or agreements, the main purpose or effect of which is to foreclose the market to outsiders, impose restrictions on trade which are unreasonable *per se.* Yet in *United States v. Bausch & Lomb Optical Company,* 321 U. S. 707, *supra,* this Court upheld the exclusive agreement between Bausch & Lomb and Soft-Lite by which the former agreed to manufacture exclusively for the latter, and the latter agreed to purchase exclusively

from the former, pink tinted glass, although this obviously foreclosed Bausch & Lomb as a potential manufacturer for other distributors of pink tinted lenses and Soft-Lite as a potential customer for pink tinted glass made by other manufacturers. In *United States v. Columbia Steel Company,* 334 U. S. 495, this Court referred to this exclusive agreement between Bausch & Lomb and Soft-Lite as a typical example of a valid exclusive dealing contract (p. 523, note 23).

Thus, it is seen that the mere fact that an agreement calls for a restraint which would be illegal *per se* if the imposition thereof were the only purpose of the agreement does not cause the agreement to provide for a restraint which cannot be reasonable, if the restraint is reasonably necessary under the circumstances, and ancillary to the consummation of a valid main agreement.

B. The appellee's contentions that the restraints were in no sense ancillary to a joint venture.

The appellee relies first upon the finding of the district court that there was no joint venture, and calls attention to the fact that the district court found that the 1928 business agreements merely extended the long existing arrangements between alleged potential competitors "who continued such arrangements in order to escape each other's competition" (Appellee's Brief, pp. 86-88). We have dealt in our main brief with the district court's fundamental error in overlooking important evidence in arriving at this conclusion (pp. 146-153). There it is pointed out that the district court based this conclusion upon the mistaken theory that from 1925 until the acquisition of British Timken by American Timken and Dewar in 1927, there was not even a colorable legal basis for the continuation of the 1909 license agreements after the basic British patents on bearings had expired in 1924, contrary to the uncontroverted evidence in the record that American Timken pro-

ceeded at that time in accordance with advice of its American trademark counsel that continuation of the license agreements was amply justified by the license of the trademark by American Timken to British Timken, supported in 1926 by the opinion of eminent British trademark counsel.

Significantly, the appellee has nothing to say about the contemporaneous declarations of the "partners" in 1927, 1929 and 1936.

Opposing counsel argue that the relationship between American Timken and Dewar created by the Heads of Agreement of May 16, 1927, did not meet "the familiar legal criteria of a 'joint venture'" (Appellee's Brief, pp. 89, 90). A complete answer to these contentions is that this Court determined in *United States v. Bausch & Lomb Optical Company*, 321 U. S. 707, *supra*, that an arrangement involving even less of the characteristics of a technical legal joint adventure, creating reciprocal legal rights, than that involved in the case at bar, nevertheless constituted a sufficient justification for the imposition of those restraints which can be validly imposed in connection with the organization of a partnership, *by analogy to the principles applicable to partnerships.* Similarly, in *United States v. Scophony Corporation of America*, 333 U. S. 795, this Court did not find it necessary to determine that all of the legal incidents necessary to the creation of a true legal joint adventure were present in order to apply *by analogy* the principles applicable to a legal joint adventure to "what practically, *if not also technically,* was a joint adventure * * *."

The efforts of opposing counsel to distinguish the *Bausch & Lomb* case are singularly unimpressive. While they emphasize in other parts of their brief the fact that British Timken and French Timken were *potential* competitors of American Timken, they seek to distinguish that case on the basis that Bausch & Lomb (which, of course, could have marketed the pink tinted glass which it pro-

duced at any time in competition with Soft-Lite) was not an actual competitor of Soft-Lite (Appellee's Brief, p. 93).

They also develop, without authority, the theory that "one way" restrictions may be valid ancillary restraints, whereas "mutual" restrictions cannot be (Appellee's Brief, pp. 93, 94). What difference could it possibly make, in determining whether restraints are ancillary to a valid main transaction, whether they are imposed on one of the parties thereto or both?

C. The appellee's contentions that the alleged restrictions cannot be justified as ancillary to the licensing of the name "Timken."

There are many omissions from that part of the appellee's brief devoted to a discussion of the trademark licensing, which are more persuasive than the material therein contained. It is, we submit, of the highest significance that there was no discussion of the provisions of the Lanham Act, dealing with that subject; of the international conventions to which this country is a party, in which the subject of trademark licensing is clearly referred to; nor of the decisions cited in our main brief on the points that registration of the trademark may be properly carried in the name of a licensee and that a trademark may be introduced into a territory wherein it has not theretofore been used by the licensor through the medium of a trademark license. These matters are fully argued and discussed in our main brief (pp. 99-138)

There was discussion on the subject of ownership of the mark and the claim is asserted again that American Timken was not the owner of the mark in various areas of the world. This point was discussed at some length in our main brief (pp. 101-120) and it is not necessary to elaborate on it further in this reply brief beyond commenting upon some of the completely unsound statements made in the appellee's brief.

On page 59, the statement is made that:

"Appellant admits that it has no common law rights arising from the use of the mark 'Timken' in areas of the world allotted to British Timken and French Timken."

There is no reference to the source of such alleged admission for the obvious reason that none was ever made. The common law as such had no application on the continent of Europe or in most sections of the world outside of England and the English colonies, protectorates and the United States. It would not have made sense to have admitted the lack of any common law rights in countries where none could have existed because there was no common law.

On page 77, note 76, the appellee refers to the fact that after the passage of the Trademark Act of 1946, American Timken registered the mark "Timken" and is now in a position to utilize the provisions of the statute banning through the facilities of the customs authorities importation of bearings with the mark "Timken" on them. This is a clear statutory right of American Timken and we are at a loss to know why any special significance is attached to its use. Reference was also made on page 77 of the brief to the recording of the registration of the mark with the Bureau of Customs in 1921 preceding any connection with Dewar by six years. Why it is important in respect of the association with Dewar and the licensing of British Timken to use the mark "Timken" is left to imagination.

On pages 104 and 105, statements are made to the effect that ownership rights in a trademark arise only from use of the mark in connection with the sale of products. This is clearly an incorrect statement, for in many countries of the world, use has nothing to do with ownership. The first person to register the mark becomes the owner of it. Derenberg, *Trademark Protection and Unfair Competition*, pp. 16 and 17; Ladas, *The International Protection of Industrial Property*, pp. 489, *et seq.*

It is difficult to understand the statement on page 111 that:

> "Appellant has no legal rights to the mark in England but only a contractual right against British Timken to come to fruition in 1965 when (and if) the current agreements terminate and not renewed."

It would seem that an inquiry is appropriate as to whether contractual rights are not legal rights and whether legal rights cannot be based upon a contract.

On page 113, the appellee states that American Timken had "complete control over the development and use of the name 'Timken' at the time when its international use began in 1909."

This is obviously incorrect for, as pointed out in our main brief, American Timken could not register the mark in foreign countries until it was able to obtain registration in the United States. It was not in a position to do so until the amendment to the Trademark Act in 1920.

In asserting the claim that American Timken was not the owner of the trademark in various areas of the world, the appellee has not been able to point to any finding by the district court declaring that American Timken did not own the mark in any specific country. Nor is any attempt made to explain the challenge of ownership which is in direct conflict with the allegations of the amended complaint.

On pages 109 and 110 of the appellee's brief, there is a table inserted which purports to show the status of registrations in various countries of the world and from this table the argument is made that there were some forty countries in which no registration had been obtained at the time of trial. An examination of this list of countries shows a curious hodge podge of countries that are entirely insignificant from a manufacturing standpoint. Some of them are in the territory of American Timken and therefore not covered by any license by American Timken to British Tim-

ken or French Timken; others are colonies and protectorates of European countries where presentation of a registration from the mother country is necessary to obtain a registration therein; others have no trademark registration laws; none of them are of any manufacturing importance. It is obvious that any bearings imported into these areas would be, either in equipment produced in manufacturing areas of the world, or for replacement parts in such equipment. As a practical matter, registration in such areas is unimportant for the reason that registrations in the manufacturing areas of the world afford complete protection in these non-manufacturing sections.

An examination of this table on pages 109 and 110 of the appellee's brief shows beyond any question that as of the time the license was given by American Timken to British Timken and French Timken in 1928, there were registrations of ownership of the trademark in all the important manufacturing areas of the world and any attempt to attack the license at this time on the basis of lack of ownership is without foundation.

Finally, on page 67 of the brief, the government states that:

> "The division or allocation of *exclusive* territories is the crux of this case."

It should be pointed out again that at no time since 1928 has the use of the trademark by British Timken and French Timken in the areas in which they have been manufacturing been exclusive. On the contrary, the record shows clearly, and indeed the contracts have always so provided, that American Timken could and did make use of the trademark in such areas on its bearings manufactured and sold to producers of equipment in the United States and elsewhere (Pltf's. Exh. 179, R. 1693; offered, R. 952; R. 1701; Deft's. Exh. 99, R. 2005; offered, R. 594; R. 2005). If the alleged exclusive feature of the license is the determinative factor and the charge of exclusiveness is unsound,

then the entire argument of the appellee in respect of the alleged unlawful character of the agreements involved in this case must fail.

On page 113 of its brief, the appellee described as "hokus pokus" the registration of American Timken as registered user of the trademark in England. In point of fact, it was a step taken in full compliance with British law only to cover the use of the mark in England by American Timken as contemplated by the 1938 contract. As has been shown, the bearings of American Timken were going into the English market as a part of American made equipment, and as replacement parts for use in such equipment. No proof has been afforded, as indeed none could be, that such action had any effect on the ownership of the trademark by American Timken, as such ownership was recognized and acknowledged in all the earlier agreements with Dewar and British Timken and French Timken.

The brief of the appellee warrants specific answer with respect to three other matters. First is the claim that the licensed use of a trademark is "monopolistic" and that it is not such a transaction as should be encouraged. Second, is its claim that the requirement of the 1928 business agreement and succeeding agreements that British Timken and French Timken use only the mark "Timken" on tapered roller beatings is unlawful. Third, is the claim that the reversionary clause in the 1938 agreement requiring that the mark revert to American Timken after use thereof by British and French Timken is unlawful.

1. The licensed use of a trademark is competitive and is not monopolistic.

The basis of the appellee's opposition to the trademark license in this case is perhaps unwittingly shown on page 98 of its brief wherein this language appears:

> "The ancillary restraint doctrine is based upon the rationale that the primary transaction is not only lawful but should be encouraged in the public interest.

Trademark licensing is not such a primary transaction."

From this language it is perfectly apparent that the appellee in this case has an inherent dislike of controlled trademark licensing as an instrument of commerce and that this is the true basis of the views that are expressed in the brief filed in this case on its behalf. When consideration is given to this statement, it is understandable that no reference is made in the appellee's brief to the provisions of the Lanham Act relating to controlled licensing of trademarks, to the provisions of the international conventions, or indeed to the many cases decided in this country involving the normal practices incident to trademark licensing, including the decisions of this Court on the same subject.

The fact is that a trademark license is a competitive instrument and not a monopolistic one. It is said at another point of the appellee's brief (p. 98) that a trademark owner is not entitled to any ancillary provision to protect "such a territorial product monopoly." Viewed in its proper light, a trademark is not a territorial product monopoly. On the contrary, it is a territorial monopoly in good will for the obvious reason that no third party is precluded by ownership of a trademark or by its controlled licensing from making a competing article.

The function of the trademark is to provide ready identification of goods and to associate them with the good will that has been developed in their production by the owner of the trademark. It is easy to understand why any man who has goods to sell should not hesitate to adopt a trademark and begin its use, because by so doing he is adopting a means of perpetuating the good will of his business. The use of a trademark and the process of developing good will in it, whether by user of the owner or by a controlled license, are not the result of, and do not result in, monopoly. On the contrary, they are the result of the existence of competitive forces which make it desirable for

the owner of a trademark to develop good will as a means of distinguishing his product or the product of his licensee from that of his competitors. In this case, if all the antifriction bearings in the world were manufactured by American Timken, there would be no need for it to consider the adoption of a trademark, for there would be no antifriction bearings in the market from which it would be necessary or desirable to have its goods distinguished.

The very fact that a trademark has been developed indicates very plainly that there is competition in the sale of the product covered by the mark and, further, that the owner of the mark is desirous of having his goods distinguished from those of his competitors in the same field. The trademark is a convenient way of accomplishing just that, but this does not mean that there is any monopoly in the production of goods of the type covered by the trademark, for any third party is free to manufacture and sell such goods as long as in so doing he does not appropriate any good will developed by the owner of the trademark.

The Congress of the United States at the time of the enactment of the Lanham Act recognized that trademarks were instruments of competition and did not develop monopoly. In Senate Report No. 1333, 79th Congress, 2nd Session, submitted May 14, 1946,[3] under the heading "Trademarks Defeat Monopoly by Stimulating Competition" the following appears:

> "This bill, as any other proper legislation on trademarks, has as its object the protection of trademarks, securing to the owner of the good will of his business and protecting the public against spurious and falsely marked goods. The matter has been approached with the view of protecting trademarks and making infringement and piracy unprofitable. This can be done without any misgivings and without the fear of fostering hateful monopolies, *for no monopoly is involved in trademark protection.*"

---

[3] Robert, *The New Trademark Manual*, p. 267.

Later on under the same heading, this appears:

"Trademarks are, indeed, the essence of competition, because they make possible the choice between competing articles by enabling the buyer to distinguish one from the other. Trademarks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect trademarks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not. This is the end to which this bill is directed."

Repeatedly in the appellee's brief, reference is made to the older conceptions of a trademark and its uses. In the report it is clearly shown that one of the purposes of the Congress was to modernize trade-mark law in the United States for it is there stated:

"Moreover, ideas concerning trade-mark protection have changed in the last 40 years and the statutes have not kept pace with the commercial development. In addition the United States has become a party to a number of international conventions dealing with trade-marks * * *. These conventions have been ratified, but it is a question whether they are self-executing, and whether they do not need to be implemented by appropriate legislation.

Industrialists in this country have been seriously handicapped in securing protection in foreign countries due to our failure to carry out, by statute, our international obligations. There has been no serious attempt fully to secure to nationals of countries signatory to the conventions their trademark rights in this country * * *"

Then the purposes of the bill are enumerated, among which are

"2. To carry out by statute our international commitments to the end that American traders in foreign countries may secure the protection to their marks to which they are entitled * * *

3. To modernize the trade-mark statutes so that they will conform to legitimate present-day business practice."

There is no provision contained in the trademark license involved in this case which is not supported by statute and the decided cases, or which undertakes to engraft upon the license any rights to which the owner of a trade-mark is not entitled. Thus, it is clear that the entire argument of the appellee on the subject of trade-mark licensing, being predicated upon an unsound premise, must fall.

2. There is no unlawful restraint involved in requiring British Timken and French Timken to manufacture under the mark "Timken."

The basis of this claim by the appellee is that the inclusion of such a provision in the trade-mark license agreement between American Timken as licensor, and British Timken and French Timken as licensee, has the effect of foreclosing American Timken's competitors from sales of anti-friction bearings to British Timken and French Timken. The argument is that since the latter companies can deal only in bearings marked "Timken," they could not buy bearings from the Bower Company, New Departure, (other American manufacturers) or any other anti-friction bearing manufacturer in the United States. A fair test of whether or not such a provision is unreasonable or unlawful is: would American Timken, if it were manufacturing abroad and using its mark there as a manufacturer, be interested in purchasing bearings from another American manufacturer carrying a different mark? The answer, of course, is unqualifiedly "No," for the obvious reason that American Timken would not be interested in "pushing" the products of a competing manufacturer. There is as a consequence no sound reason why American Timken's *alter egos,* its licensees British Timken and French Timken, would proceed on a different basis.

The court will bear in mind that as licensees, these companies are *bearing manufacturers*; that the trade-mark that they are using is a manufacturer's trade-mark. Certainly there is no real "restraint" involved in a provision that requires the licensee to use that mark exclusively, for the obvious reason that as a manufacturer it would not consider using any other mark. Surely British Timken or French Timken as a manufacturer would not be interested in buying from New Departure, any more than General Motors would be interested in explaining to its representatives in the United States and over the world that it was in a position to supply them with Ford automobiles. Would the manufacturer of Camel cigarettes in the United States ever consider advising its distributors that it had arranged to supply them with Chesterfields? Yet, this is the kind of "competition" the restraint of which the government urges is unlawful if included in a trade-mark license agreement.

There is a further and equally sound reason why such a provision in the license agreement is normal, and that is that, if a licensee is permitted to manufacture and sell the same articles as those covered by the trade-mark license under different trade-marks, the effect would be that the value of the mark would be seriously impaired. Customers of such a licensee would immediately feel that the product sold under the licensor's mark was not worth what the licensor claimed, since the licensee was manufacturing a similar product under another mark. This, of course, is in no wise comparable to the situation involved in connection with a patent license. The owner of a patent has a true monopoly and is in a position to prevent anybody from manufacturing the article covered by the patent. There is nothing in either the ownership or the controlled licensing of a trade-mark that prevents a third party from manufacturing a competing product.

Such a provision in a trade-mark license is one that is calculated to require the licensee to "push" the sale of the

product under the trade-mark and thus maintain the value of the mark for the owner. To the extent that a licensee would manufacture a competing product he would dilute the value of the mark. Such exclusive provisions have been recognized as sound in the only cases on this point. Thus, in *The Coca Cola Bottling Company v. Coca Cola Company,* 269 Fed. 796 (D. C. Del. 1920), the license agreement provided that the licensee would "not manufacture, deal in, sell, offer for sale, use or handle or attempt to do so, either directly or indirectly, any product that is a substitute for Coca Cola" (p. 802) and the court held that this provision, as well as others, was "ancillary and incidental" to the licensing of the trademark (p. 808). The same doctrine was upheld in *Brosious v. Pepsi-Cola Company,* 155 Fed. (2d) 999 (CCA 3, 1946), in which, in an action for treble damages under the anti-trust laws, the court definitely implied (p. 101) that a provision that the licensee would not handle any other product with the name "Cola" or any beverage which could be confused with "Pepsi-Cola" was a reasonable condition "calculated to protect the good reputation of its product which is sold under a trade-marked name." See also, *Associated Perfumers, Inc. v. Andelman,* 316 Mass. 176, 55 N. E. (2d) 209 (1940), and *Harris Calorific Company v. Marra,* 345 Pa. 464, 29 Atl. (2d) 64 (1942).

Finally, to avoid deception it is necessary that the licensor in a controlled trademark license supply technical information to his licensee to insure the quality of his licensee's product. Would it be fair for the licensee to use such information to manufacture a different product, or conversely is it unreasonable for the licensor to insist that the information which he gives to the licensee be used for the purpose for which it was intended, namely, to develop goodwill in the trademark covered by the license?

We submit that these considerations show clearly the unsoundness of the appellee's views.

3. The reversionary clause in respect of the trademark in the 1938 agreement which provided for the return by British and French Timken of the mark to American Timken is not unlawful.

One of the features of the 1938 agreement to which the appellee takes exception is the reversionary clause which provides that at the end of the license term, the mark will revert to American Timken. While this claim was advanced in the district court, an examination of the memorandum opinion fails to disclose any reference to it by that court. In point of fact, there is no sound basis for the contention that a licensor should not provide in a license agreement for the return of the subject of the license. If it were not lawful to include such a provision in an agreement licensing a trademark, no trademark owner could ever afford to execute a license of the mark. The penalty for so doing under the appellee's theory would be complete loss of the trademark to the licensee. The appellee cites no authority to support this contention. Among the cases cited in our brief in chief is the case of *E. F. Pritchard Co. vs. Consumers Brewing Company*, 136 Fed. (2nd) 512. On page 519 of its opinion that court said, among other things, that:

> "An owner of a trade name who lends the use of such trade name may resume its exclusive use according to the terms of the lending."

The same conclusion is implicit in the *Scandinavia Belting Company*, *F. R. Arnold & Company* and *The Dental Products Company* cases, cited on pages 110-111 of our main brief.

We submit that the provision that contemplates a reversion of a trademark to American Timken is a normal, sensible and necessary requirement in a trademark license and that it is in no sense unlawful to include such a provision in a license agreement.

III.

THE APPELLEE'S CONTENTION THAT THE FINDINGS OF FACT UPON WHICH THE DISTRICT COURT BASED ITS JUDGMENT ARE CORRECT AND ARE CLEARLY SUPPORTED BY THE EVIDENCE.

While the appellee relies upon *United States v. Yellow Cab Company,* 338 U. S. 338, as authority that this Court should not review the action of the district court in determining, on the evidence, the intent of the alleged parties to the combination, we call attention to the fact that in *United States v. U. S. Gypsum Company,* 333 U. S. 364, *supra,* the very first finding of the district court held clearly erroneous by this Court was one that the evidence "fails to establish that the defendants associated themselves in a *plan* to blanket the industry under patent licenses and stabilize prices" (p. 393). This Court emphasized the fact that insofar as the district court's findings are "inferences drawn from documents or undisputed facts, * * * Rule 52(a) of the Rules of Civil Procedure is applicable" (p. 394). As pointed out in our main brief (p. 9), the appellee's evidence was almost entirely documentary and therefore the district court necessarily based its decision against American Timken upon inferences from documentary evidence and undisputed facts rather than upon the testimony of witnesses.

A. The appellee's contention that American Timken combined and conspired with potential competitors.

The appellee first argues that American Timken recognized that E. & O. A. was a potential competitor because the 1909 license agreement limited E. & O. A. to its territory (Appellee's Brief, pp. 117, 118). Such reciprocal provision is, of course, an ordinary incident of a patent license and has no particular significance in determining whether or not a licensor deems the licensee to be an *actual* potential competitor. It is difficult to see how E. & O. A. could have been recognized as an actual or potential competitor in 1909

since that company had never produced any anti-friction bearings before that date and as far as the record shows had never indicated any interest in so doing. The fact is that the evidence discussed in our main brief (pp. 33-36) shows that E. & O. A. did not do at all well in the manufacture of tapered roller bearings and at no time was a potential or actual competitor of American Timken.

The appellee next argues that British Timken, from its inception in 1920, experienced a rapid and substantial growth relatively greater than that of American Timken (Appellee's Brief, p. 118, note 101). This is the same discussion which confused the district court when it found that British Timken's growth had been relatively faster than American Timken's, discussed in our main brief (p. 142), which shows that it is based upon an inaccurate comparison of sales of the two companies, British Timken's sales being carefully selected by the appellee from favorable years, which produced the inaccurate conclusion. The statement that British Timken had produced as many as 660,000 bearings a year is particularly unimpressive, in view of the facts that as late as 1920, 11 years after E. & O. A. had undertaken the manufacture of the bearings in 1909, American Timken apparently found it necessary to insist upon an amendment of the 1909 license agreement, covering the United Kingdom, which gave it a right to rescind in the event that Wolseley Motors did not produce a minimum of at least 400,000 bearings in 1920, and 500,000 in every subsequent year (Deft's. Exh. 192, R. 2343; Section 6, R. 2345), and the 660,000 figure was not achieved until the year commencing October 1, 1925 and ending September 30, 1926 (R. 1830). Moreover, while the appellee dilates on the fact that British Timken paid \$62,556 royalty in 1923 (Appellee's Brief, p. 118), it fails to call attention to the fact that the royalties dropped to \$31,075 in the next year and were only \$45,604 in 1926 (Deft's. Exh. 230, R. 2545), after the 1924 reduction from 10% to 5%.

It is said that British Timken's only competitor in England in 1928 was British Bock, Limited (Appellee's Brief, p. 119) in the face of the contemporaneous documentary evidence clearly establishing that as early as 1923 British Timken was sustaining damaging competition from Skefko, the British SKF subsidiary, in the manufacture of tapered roller bearings, which caused it to ask repeatedly for reductions in royalties (see our main brief, pp. 38-40, 42).

Finally, we have the amazing statement that the facts "fully support the conclusions of the district court that *at the time of the formation* of French Timken by appellant and Dewar, the French company was the largest dealer in tapered roller bearings in France * * * and a potential competitor of appellant" (Appellee's Brief, p. 120).

This is another example of the strenuous attempt to build a case, at least on paper, showing a combination between the giants of a mythical roller bearing industry—as early as the organization of one of them—which pervades this entire case.

Moreover, this argument overlooks completely the fact that SMG, the independent former sublicensee of British Timken when it was Vickers' subsidiary, which was sold to SKF in 1930 (see our main brief, p. 143) was equipped to manufacture tapered roller bearings and undoubtedly continued to do so.

B. The appellee's contentions as to findings as to competition between tapered roller bearings and anti-friction bearings.

The appellee contends that it was not necessary for the district court to ascertain with particularity the extent of the elementary competition or freedom from competition between tapered roller bearings and other anti-friction bearings (Appellee's Brief, p. 122), again ignoring in its discussion the undisputed fact that they compete 90% of the

time. On the contrary, it was very necessary, of course, to determine the extent of competition in view of the great importance placed by the district court upon the alleged "dominant" positions of the three Timken companies in the alleged bearing, anti-friction bearing, roller bearing and tapered roller bearing industries to which it referred (see our main brief, p. 12, note 4).

It is said that, in any event, whether or not the Timken companies dominated the alleged tapered roller bearing market has no significance because this is not a monopoly case (Appellee's Brief, p. 123). Yet clearly the district court's findings in this respect are significant in that, if it had not been mistaken as to the position of the companies in the industry in which they compete, it would not have adopted such harsh provisions in its judgment, particularly those which prevent the exclusive exchange of patents, know-how, machinery and materials.

C. The appellee's contentions with respect to the treatment of the three Timken companies as separately operated units, the district court's refusal to consider the evidence as to a joint venture, and its findings that the relationship between the parties was merely a continuation of an illegal combination dating from 1909.

1. The argument that American Timken was merely a stockholder in British Timken and French Timken.

The appellee first undertakes to support the district court's finding that there was no joint venture, merely ownership of stock by American Timken in British Timken and French Timken,—the familiar argument urged unsuccessfully by the defendant in *United States v. Scophony Corporation*, 333 U. S. 795, a decision which opposing counsel have not dignified by mentioning. The appellee seeks to support the district court's finding that in any event any joint venture was ended in 1934. This matter was dis-

cussed in our main brief (p. 82, note 26), in which the utter lack of any basis for this conclusion is shown.

2. The claim that, in fact, the acquisition of American Timken and Dewar constituted merely the continuance of an existing combination between American Timken and British Timken, Vickers' subsidiary.

Opposing counsel argue that the district court considered, and that we conceded in argument that it had considered, all of the evidence as to the complex financial relationships between American Timken and Dewar (Appellee's Brief, p. 126). The district court's memorandum clearly disclosed that, whether or not it was aware of the evidence as to these matters, it disregarded them on the mistaken theory that, even if the facts would otherwise have constituted a valid joint venture, this made no difference because there was an *intentional* combination in restraint of trade, and, therefore, what otherwise might have been a joint venture, could not constitute a "cloak" for it. (See our main brief, pp. 146-153.)

The appellee then argues that in 1924 American Timken "began to cast about" for devices other than the basic bearing patents to support the territorial allocations between it and British Timken, and hit upon the alleged device of the license of the trademark "Timken" (Appellee's Brief, p. 128), that Dewar's underlying motive for making the 1928 business agreement was his desire to escape American Timken's competition and continue the alleged combination in restraint of trade (Appellee's Brief, p. 127), and that American Timken was well aware that he was acting in order to escape this competition, and that one of the purposes of the agreements was to satisfy Dewar in his desire not to have its competition in the areas allocated to British Timken (Appellee's Brief, pp. 127, 128).

We pointed out in our main brief in detail (pp. 148, 153) that, although the district court specifically considered

the statement of American Timken's British solicitor, Duncan, in 1927 in a letter to American Timken as an avowal by the latter of a purpose to suppress competition, nevertheless it completely disregarded the legal advice actually given by American Timken's trademark counsel to it in 1924 to the effect that the license of its trademark to British Timken constituted a legal basis for the continuation of the license agreement and payment of royalty thereon, as well as the opinion by eminent British trademark counsel in 1926, which reenforced this opinion. Since the district court cited one specific piece of evidence in support of its conclusion, it is to be assumed that it cited all of the evidence which it considered on this point. Otherwise, the court would have weighed the evidence and stated its reasons for rejecting the evidence reflected by the opinions given to American Timken by its Amrican and English trademark counsel.

Furthermore, acquisition of British Timken by American Timken jointly with Dewar represents a complete departure from the previous practices. The system of merely licensing the Vickers subsidiaries had failed as a method of promoting tapered roller bearings in competition with other anti-friction bearings in Europe, and American Timken now was starting on an entirely new program for that purpose.

No inference of an intention to suppress competition illegally is to be drawn from the fact that Dewar apparently desired to avoid competition from American Timken in investing his life savings in this enterprise. Dewar undoubtedly assumed, when he suggested an extension of the license agreements, that the provisions thereof were legal, and they were so, because, as its American trademark counsel had advised American Timken in 1924 (Pltf's. Exh. 173, R. 1683; offered, R. 949, 950) and as Kerley and Bray, the British trade-mark counsel, had advised it in 1926 (Deft's. Exh. 99, R. 2005; offered,

R. 594), the licensee had the right to use the name "Timken" which constituted one legal basis for the license agreements thereafter. If, incidental to the licensing of the trade-mark, it was legal to protect the licensee from competition by the licensor, and if it was also legal to extend this protection in connection with the joint adventure, as we contend, then the fact that Dewar sought to obtain the protection to which he was legally entitled, does not lead to any inference that either he or American Timken intended to eliminate competition otherwise than as legally ancillary to the main transaction.

Thus, the parties did not consciously contemplate the extension of alleged illegal agreements in 1927, but merely the implementation of those which they considered to be legal, upon advice of counsel, and they only intended thereby to restrain competition to the extent to which they were legally entitled for their protection.

D. The appellee's contention as to the findings that the Timken companies had combined and conspired to suppress competition of outsiders by acting collectively against outsiders or joining with them.

The appellee apparently misconceives the purport of the statement in our brief (p. 153) as to referral of orders (Appellee's Brief, p. 129). We did not intend to give the impression that there was only one incident in which orders were referred to the other Timken companies by American Timken, and do not think that this conclusion is to be drawn from our statement, which specifically cited the district court's statement on this point (see our main brief, p. 153, which cited the district court's memorandum, par. 71, R. 973). The incident with respect to the order from Ford in 1929 for its Cork, Ireland, plant was not one of the typical referrals, but instead an incident in which American Timken is supposed to have sold bearings to British Timken at a low price for the purpose of carrying out their cooperative enterprise.

With respect to the agreements of British Timken and French Timken with competitors in their areas, the appellee merely asserts that the district court found that American Timken, while not actually a party to these arrangements, had cooperated and consulted with the other Timken companies in bringing them about and had approved these agreements before they were executed (Appellee's Brief, p. 131). The evidence referred to does not support these conclusions, but merely demonstrates that Hess of American Timken knew about the agreements between British Timken and SKF governing the United Kingdom, although he never participated in making them, and that after an agreement had been made between French Timken and SKF covering France in 1930, the renewal thereof in 1932 was submitted to officials of American Timken, and they did not interfere with Dewar's decision to renew it. (See our main brief, pp. 159-161.)

E. The appellee's contentions as to evidence of price-fixing.

These contentions are discussed and answered under Section I, B, 1, *supra*.

F. The appellee's contentions that the district court properly adopted its memorandum opinion as its findings of fact and conclusions of law.

Perhaps the only answer necessary to this portion of the appellee's brief (pp. 133-135) is that the appellee recognizes in note 1, page 5 thereof, that much of the opinion of the district court consists of matter which cannot be properly regarded as either findings of fact or conclusions of law. The appellee has found it desirable to designate certain portions as findings, others as conclusions, and others merely as portions of the opinion. This indicates the nature of the memorandum and shows that it does not perform the proper function of findings of fact and conclusions of law which would justify the district court in adopting it as such.

IV.

THE APPELLEE'S CONTENTIONS AS TO THE RELIEF ORDERED BY THE DISTRICT COURT.

A. The appellee's contentions as to divestiture.

Much of the appellee's argument regarding divestiture is based upon the assumption that British Timken and French Timken "were and are" American Timken's "potential competitors." We have shown in our main brief, pages 138-144, how completely erroneous this assumption is. With respect to French Timken, which was established largely with American Timken's funds, it approaches the absurd. Since this erroneous assumption is its basis, the whole argument is seriously undermined.

But even if British Timken and French Timken are regarded as "potential competitors" of American Timken (although surely their "potentiality" in 1927 was, and even now is, very small), still we are faced with the tests of the *Columbia Steel* case as to the legality of the acquisition of a competitor. At pages 193 to 195 of our principal brief, we have shown that by the tests, the acquisitions were not illegal.

The appellee relies mainly on three cases to sustain the divestiture provisions of the final judgment, *United States v. Paramount Pictures, Inc.,* 334 U. S. 131; *United States vs. Crescent Amusement Co.,* 323 U. S. 173, and *United States vs. National Lead Co.,* 332 U. S. 319. We have already analyzed each of these cases in our principal brief, and submit that, as applied to the case at bar, they do not support the type of decree for which the appellee contends.

In the *Crescent Amusement* case, 323 U. S. 173, as this Court said (page 181):

> "The crux of the government's case was the use of the buying power of the combination for the purpose of eliminating competition with the exhibitors on acquiring a monopoly in the areas in question."

Competitors unable to obtain films, therefore, would "go out of business or come to terms and sell out to the combination with an agreement not to compete for a term of years." It is clear from this Court's opinion (pages 189-190), that it was this abuse of the monopoly power, and the fact that the holdings to be divested were so acquired, which justified the divestiture order.

The *Paramount Pictures* case, 334 U. S. 131, approved, first, the divestiture of interests in theaters acquired as "the products of the unlawful practices" (p. 152). This is apparently the same situation as in the *Crescent Amusement* case, that is, that competitors were forced out of business and their theaters acquired by the defendants. Certainly, no similar claim is made with respect to American Timken's purchase of its interest in British Timken and the establishment of French Timken. The second classification was that of interests which, "though lawfully acquired, may have been utilized as part of the conspiracy to eliminate and suppress competition"—that is, they were thrown into the pooling agreements and clearance systems by which the five major exhibitor-defendants avoided competition among themselves and with others. As we have pointed out in our principal brief (pages 190-191), the argument that American Timken utilized its interests in British Timken and French Timken to promote the conspiracy, is wholly at odds with the district court's findings as to their independence of American Timken. The portion of the argument in the district court to which appellee refers in its brief, at page 140, note 7, shows that the dilemma in which the district court found itself bothered it and the appellee, and that the latter therefore was forced to fall back on a completely different and entirely new and novel ground to sustain the divestiture provisions—namely, that continued ownership of these interests would afford an inducement for American Timken not to compete with British and French Timken.

There is no support for this theory in the *Paramount Pictures* case, which speaks, third, of the divestiture of interests which "would afford opportunity to perpetuate the effects of the restraints on trade." This is tied in with the second classification, namely ~~mainly~~ of interests utilized as part of the conspiracy, so that it depends upon *control* of the foreign companies, which the district court here found to be lacking.

In the *National Lead* case, 332 U. S. 319, the stockholdings ordered divested were not interests in foreign corporations which were found to be co-conspirators, but were interests in companies which were jointly owned by National Lead *and such co-conspirators,* and which had been assigned exclusive territories under the plan for dividing the world markets in titanium pigments. In this way, the stock acquisitions were "part and parcel of the territorial allocation agreements." We would have a comparable situation in this case if Dewar, as a producer of anti-friction bearings on his own account, and American Timken had been adjudged the co-conspirators. Dewar had no personal interest in the production of anti-friction bearings prior to 1927 when he joined American Timken in this enterprise. But, even in the *National Lead* case, the National Lead Company *was* permitted to acquire the interests of the other co-conspirators, apparently because such acquisition would not have the effect of giving National Lead unlawful monopoly power in the industry on an international scale. This is exactly what American Timken contends with regard to the divestiture provisions in the case at bar.

The error in the district court's judgment in respect to divestiture and to the prohibition of further acquisitions of British and French Timken stock is made even more apparent, and its injustice all the more pronounced, by reason of the situation which arose upon the death of Dewar on December 21, 1950, while this case was pending on appeal

in this Court. Upon Dewar's death, pursuant to an agreement between him and American Timken, dated March 22, 1948 (Pltf's. Decree Exh. 3, R. 2680; offered, R. 1142), which succeeded several previous agreements containing substantially the same provisions, American Timken became entitled to purchase his stock in British Timken, consisting of 94,960 ordinary shares. These, added to its own 121,040 shares (Deft's. Exh. 186, R. 2298; offered, R. 911), would constitute 54 per cent of the 400,000 total ordinary shares in British Timken issued and outstanding. Under an agreement between them and others, dated December 10, 1935 (Deft's. Exh. 228, R. 2483; offered, R. 942, R. 2534), American Timken was given the right upon Dewar's death to acquire such shares in French Timken as would give it voting control of that company, and if the remaining shares were to be offered for sale to purchase such shares as well.

American Timken has already taken steps to acquire the British Timken shares, and the French Timken shares giving it 100% ownership of that company.[4]

If and when this transaction has been completed, the culmination of the joint adventure with Dewar will have been achieved, and the same result accomplished as if American Timken, in 1927, instead of joining with Dewar for that purpose, had alone acquired all of the shares of British Timken (later selling some of the shares to the public generally) and had controlled it directly since

---

[4] As we pointed out in our main brief (p. 2, note 1), the district court has recently overruled our motion in that court which was designed to introduce into the record in this case the facts with respect to Dewar's death and American Timken's exercise of the options, made effective thereby, to acquire Dewar's stock in British Timken and French Timken. We have filed a motion in this Court asking that the motion in the district court and the district court's order overruling it be incorporated in the record upon appeal in this Court. The following argument is based on the assumption that American Timken will succeed in acquiring Dewar's stock in British Timken and French Timken, and that this Court will consider upon this appeal these facts as to Dewar's death and the exercise of the options.

that time, and had acted alone in establishing French Timken. We do not believe that such acquisitions by American Timken in 1927, or even in 1951, would be considered as violations of the Sherman Act under the principles laid down in *United States vs. Columbia Steel Company*, 334 U. S. 495, and *United States vs. Aluminum Company of America*, 148 F. (2) 416, discussed at greater length in our principal brief at pages 96 and 192-194. The appellee has never urged the contrary, and does not now.

The district court, of course, denied that this case raised any problems such as those presented in the *Columbia Steel* and *Aluminum Company* cases (Mem. par. 144, R. 1001), because it refused to consider that for this purpose the three Timken companies were to be treated as related in the roles of parent and subsidiary, saying:

> "Defendant did not acquire British and French Timken." (Mem. par. 144, R. 1002);

and that American Timken:

> "did not build plants in Europe or purchase subsidiaries abroad" (Mem. par. 160, R. 1005).

To the contrary, American Timken obviously *did* acquire substantial interests in those companies—not 100% ownership at the outset, it is true, but 50% or more in each; and now that Dewar is dead, it will, unless forbidden by the judgment in this case, acquire 100% ownership of French Timken and 54% ownership in British Timken. Thus, the proposition which the appellee must really urge is that although 100% ownership from the beginning would not have violated the law, ownership of less than that percentage, along with the other facts, does spell out a violation, even though it may be expected to culminate in 100% ownership in due course. We submit that such a view exalts the *form* which the transaction has taken over the *substance* of what it was intended to and did accomplish, namely, the extension of American Timken's business into European markets. But surely the application of the Sherman Act cannot be

made so to depend upon form rather than substance! Certainly the Congress never intended that Sherman Act cases should be disposed by dialectics in an economic vacuum!

Despite pronouncements which the appellee cites, that corporate affiliation does not avoid the application of the Sherman Act, this Court has also recognized that the tests of what constitutes an "unreasonable restraint of trade" cannot be the same with respect to related corporations as in the case of completely independent companies, for in the *Columbia Steel* case, *supra,* it said (p. 523):

> "When other elements of Sherman Act violations are present, the fact of corporate relationship is material and can be considered in the determination of whether restraint or attempt to restrain exists."

The two propositions are not mutually inconsistent, and the logic of the above quoted principle is so sound that it cannot be questioned. We submit that the relationship of the three Timken companies is now that of parent and subsidiary in every respect, whatever may have been lacking before, and that this principle now has very direct application in this case.

The consequences of Dewar's death in respect of the stock ownership in British and French Timken thus emphasize the soundness of the analogy between this case and *United States vs. Columbia Steel Company,* 334 U. S. 495, *supra.* It has, of course, complicated the problems with regard to the record in this Court that events have developed as they have. American Timken has sought to follow the procedures specified by this Court for such situations, in the case of *Roemer vs. Simon,* 91 U. S. 149, and approved in *Realty Acceptance Corporation vs. Montgomery,* 284 U. S. 547, and in the rules of this Court. We believe that the consequences of Dewar's death are of importance in this case, as affecting both the judgment on the merits (as explained above) and the appropriate relief and that the district court erred in holding to the contrary and refusing to take further evidence on the questions raised thereby.

As respects the relief, it is hardly necessary to add to what has been said in our principal brief at pages 184-202 on the divestiture question generally. One aspect, however, which is worthy of further comment is the reference to *United States vs. National Lead Company,* 63 F. Supp. 513 (D. C., S. D. N. Y., 1945), aff'd 332 U. S. 319, especially to the alternative form of decree in that case which permitted National Lead Company either to divest itself of all stock interests in certain foreign corporations owned jointly by it and its adjudged co-conspirators, or to acquire the stock of the latter in such companies.

We submit that under the circumstances of this case, it would be in the furtherance of justice to permit American Timken to choose between the same alternatives. It is significant that in this case the remaining shares in British Timken which American Timken has no option to purchase are widely held, no other holder being an alleged co-conspirator as in the *National Lead* case. We further submit that the acquisition of a controlling interest in British Timken and of complete ownership of French Timken will not give American Timken such control of international commerce in anti-friction bearings as would itself be contrary to the Sherman Act.

In the final analysis, the question on this phase of the cases is whether an American corporation may operate foreign subsidiaries which it does not wholly own, and of which it has acquired control following an intermediate step in which it jointly participated with a foreign citizen in the ownership and management of the foreign companies. There are many other American companies which have foreign investments representing much less than 100 per cent ownership of their foreign affiliates. Such arrangements do not unreasonably restrain trade, but rather promote it by encouraging the development of the economies of the foreign countries, which has now become one of the basic objectives of the foreign policy of the United States.

In the long run, it is such development which will promote trade between the United States and foreign countries and will inure to the greatest benefit of this country. The acquisition or the establishment of a foreign plant in conjunction with a foreign national as a means of extending the business of an American company into a foreign market in many cases, as it was in this, is a highly desirable choice of means to accomplish such a purpose. It gives a local flavor to the enterprise and it makes unnecessary the carrying of the full investment by the American company. Surely this is a lawful method of extending business.

The necessity of participating in foreign markets by means of affiliated companies established in the respective countries has been recognized by many business organizations, including such an international competitor of this defendant as the Swedish bearing company, SKF, whose size and power were shown in the trial of this case. As the Supreme Court said in the *Columbia Steel* case (page 533):

> "extension of that industry requires that the existing companies go into production there or abandon that market to other organizations."

This leaves the alternatives of acquiring existing facilities in the new territory, or creating entirely new ones. The choice of the former method should not be forbidden unless it will unreasonably restrain competition in the entire industry, under the tests laid down in the *Columbia Steel* case, *supra*. There is no hint or suggestion that from a practical standpoint the continued ownership of American Timken in such companies will do other than supply a strong competitive force in the anti-friction bearing industry.

A decision on questions of this importance to the American economy should not be made on the basis of abstract logic, but in full recognition of the economic realities involved. We submit that trade by American Timken and other companies in foreign commerce will not be promoted

by depriving them of foreign investments which they have developed over many years, and expecting them either to attempt to compete in the foreign market solely by exporting products of domestic establishments, or to embark *alone* to establish foreign factories, and systems of distribution. Rather, they should be permitted, wherever reasonably possible and wherever they do not actually restrain trade which would otherwise flourish, to develop their foreign trade along such lines as the practicalities of their particular problems require. Only by so doing can the Sherman Act be made a real instrument for the removal of restraints of trade rather than a device for imposing restraints and discouraging foreign trade.

For these reasons, we urge that, even if American Timken be held to have violated the Sherman Act by its past conduct, nevertheless the final judgment herein should be modified to order American Timken either to divest itself of all stock or other financial interests in British Timken and French Timken, or to acquire the controlling interest in British Timken and the entire ownership of French Timken.

The suggestion of the appellee (p. 148) that American Timken may not have raised any issue as to Section VIII, subsection B, which enjoins it from further acquisitions of British Timken and French Timken stock is answered by the fact that American Timken's Statement of Points To Be Relied Upon (R. 1327) states that it intends "to rely upon its assignment of errors herein and upon the following points based thereon" (R. 1327), clearly indicating that it intends to rely *inter alia* upon assignments of error numbers 31 and 32 (R. 1267, 1268) which relate to Section VIII, subsection B of the judgment.

B. The appellee's contentions as to the injunctive provisions of the judgment.

1. The appellee's contentions as to the injunction against the exclusive grant of exclusive patent licenses, know-how, material, and machinery.

The appellee makes no substantial argument with respect to this issue (Appellee's Brief, pp. 149-151). First, it merely refers to, without attempting to support by record references, the statement of the district court (Mem. par. 137, R. 1000) that exclusive exchange of know-how has been most helpful in "buttressing" alleged illegal conduct to achieve the desired result. In fact, as previously seen, the district court found that know-how received by British Timken and French Timken from American Timken was made available to their competitors, and there is no finding by the district court as to any specific instance in which exclusive exchange of patents, know-how, material or machines was resorted to by the Timken companies for the purpose, or with the effect, of eliminating competition by third parties.

It is urged, that, even though there was no allegation in the amended complaint that the exclusive exchange of know-how and of patented and unpatented inventions constituted one of the means by which the alleged combination was carried out, nevertheless the district court could deal with this matter in its final judgment. Federal Rule of Civil Procedure 15 (b) is cited as sanctioning this action on the ground that counsel for American Timken consented to the trial of this issue, the appellee citing paragraph 164 of the district court's memorandum (R. 1006) in which it discussed American Timken's contention that any restraints imposed were ancillary to its agreement to furnish know-how to the foregoing Timken companies. Obviously, "know-how" did not include patents, material and machinery. Moreover, the assertion of this defense did not constitute an implied consent to trial of the wholly different

issue as to whether exclusive exchange of know-how constituted one of the means by which the alleged combination was carried out.

2. The appellee's contentions as to agreements to fix prices.

With respect to the appellee's argument in answer to our contention that we are deprived of the right to fix minimum prices under the Miller-Tydings Act (Appellee's Brief, pp. 152, 153), it is to be observed that it makes no attempt to justify this position, but merely suggests that the judgment can be modified at some time in the future. Obviously, this does not constitute an answer to our argument, which is fully supported by this Court's reasoning in *United States v. The Bausch & Lomb Optical Company*, 321 U. S. 707, 729.

3. The appellee's contention as to the injunction against refusing to sell or selling at discriminatory prices.

It is to be observed that the appellee concedes that the program embraced in Section IX of the district court's judgment is probably intended to involve maintenance of substantial sales and service organizations in foreign countries (Appellee's Brief, pp. 154, 155). It thus takes the position that it will be necessary for American Timken to take steps to enter into export business with persons with whom it would otherwise not engage in business due to the many practical reasons against attempting to engage in export of bearings into foreign countries which have been pointed out in our main brief.

The only authority cited for this provision is *International Salt Company v. United States*, 332 U. S. 392, which is said to authorize a decree "which will pry open to competition a market that has been closed by defendant's restraints" (p. 401). However, that case does not constitute authority for requiring American Timken to engage in business. It is, we believe, the only case in which a provi-

sion for compulsory leasing of patented machinery was included over the protest of the defendant. However, the provision was not included in that case for the purpose of compelling the defendant to compete, but rather as a means of preventing the resumption by the defendant of its past practice of "tying" sales of its unpatented salt to leases of its patented salt-vending machines, which restrained competition by other vendors of unpatented salt with the defendant.

CONCLUSION.

In conclusion, we urge that, contrary to the decision of the district court, and to the picture painted in the appellee's brief, this is *not* a case where three independent companies, already of great size and well established in the anti-friction bearing industries of their respective countries, entered into contracts dividing the world into mutually exclusive territories in which they agreed not to compete with each other and, as a consequence, completely stifled all competition in the industry. To the contrary, in 1928 when the supposedly illegal combination is alleged to have commenced, French Timken, one of the three companies, was *barely coming into existence*, having been established in 1928 largely by the investment and efforts of American Timken, along with those of Dewar. The other foreign company, British Timken, although previously a subsidiary of Vickers, Ltd. and a patent and trade-mark licensee of American Timken's, had been sold to American Timken and Dewar as its sole owners, and its previous owners dropped out of the picture completely; it employed only about 500 people, and its maximum total sales in any year had been only about £240,000, or $1,150,000.00, in 1926.

Certainly, at that time, if American Timken had acquired British Timken wholly on its own account, as it considered doing, and had established French Timken without

Dewar's participation, no question would ever have been raised as to the legality of such acquisitions; and the fact that it followed the practice of dealing in certain territories exclusively for certain purposes through one company or the other would not have been considered in any way unreasonable or contrary to law.

As of the present time, British Timken has achieved more substantial size, employing about 2,400 people and making sales which in 1947 totalled $14,700,000.00. French Timken, still wholly owned by American Timken and Dewar until the latter's death, is now about as large as British Timken was in 1928, with 500-odd employees and $2,274,-723.00 in sales in 1947. Although the inadequate findings of the district court make it difficult to determine, we do not believe that the acquisition *today* of these companies by American Timken (even assuming that it had no previous financial interests in them), and its operation of them along the lines disclosed by the record, could be held to impose an undue restraint on the foreign commerce of the United States. Rather, such acquisitions would be recognized as legitimate expansion by American Timken into the European market, undertaken in that manner because of the practical, commercial necessity of doing European business in anti-friction bearings through companies organized and located there.

Instead of the above situation, the record discloses that, after consideration of such a course of action, American Timken did not *wholly* acquire British Timken in 1928 and did not establish French Timken *wholly* on its own account, but joined for these purposes with an English businessman, Dewar, because of Dewar's exceptional qualifications to promote the sale of tapered roller bearings in England and in Europe generally, and because of the belief that greater success would be achieved by having British management of the British company. At all times, American Timken and Dewar maintained their joint con-

trol of British Timken and French Timken. We have referred to the arrangement between American Timken and Dewar as a joint adventure, because it had all the features of such a relationship in law.

Yet, even this arrangement was obviously planned, if the venture proved worthwhile, to culminate in majority ownership and control of British Timken and French Timken by American Timken alone, because at all times American Timken had the option, upon Dewar's death or withdrawal, to acquire Dewar's shares.

Pending this appeal, upon Dewar's death, that eventuality became a fact, and American Timken began taking the requisite steps to exercise its options to acquire Dewar's shares in British Timken and French Timken.

We find it difficult to believe that, *under these circumstances,* the practices which were agreed upon as between American Timken, British Timken and French Timken, for the sale of bearings in certain territories, can be held to constitute a violation of the Sherman Act. We believe that the district court's decision to that effect was based upon a completely erroneous conception of the facts as shown by the record in this case and of the inferences to be drawn therefrom. We urge that it is in no degree contrary to the language or spirit of the Sherman Act for an American company to undertake to extend its business into foreign countries in the manner followed in this case, and in connection therewith to agree with the foreign companies which it is using as the vehicles for such expansion, not to compete in certain territories with respect to certain important phases of their business. So to hold would seriously interfere with the choice by American companies of the most advantageous means from a commercial standpoint for accomplishing such expansion, without any real beneficial effect in furthering the policy expressed in the Sherman Act.

Furthermore, in the absence of findings by the district court as to the effect of these arrangements upon competi-

tion in the anti-friction bearing industry on a world-wide scale and on many other essential facts, we do not believe that a sufficient basis exists in ~~the~~ record upon which it can properly be determined that a violation of the Sherman Act has occurred, or that American Timken should be prevented from acquiring control of British Timken and absolute ownership of French Timken.

We ~~admit~~ submit that under the true and complete facts as shown by the record~~s~~, the judgment of the district court is erroneous and should be reversed; and we again ~~so~~ urge.

Respectfully submitted,

LUTHER DAY,
1759 Union Commerce Bldg.,
Cleveland, Ohio,

JOHN G. KETTERER,
First National Bank Bldg.,
Canton, Ohio,

Counsel for Appellant.